No. 05-787

# In the Supreme Court of the United States

MICHAEL BRAD MAGLEBY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*

WAN J. KIM
*Assistant Attorney General*

JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether counsel for petitioner on direct appeal provided ineffective assistance by omitting a First Amendment challenge to the jury instructions on the charges of conspiracy to violate civil rights, in violation of 18 U.S.C. 241, and intimidation or interference with housing rights on the basis of race, in violation of 42 U.S.C. 3631.

2. Whether counsel for petitioner on direct appeal provided ineffective assistance by omitting a challenge to his conviction for a use of fire in the commission of a felony, 18 U.S.C. 844(h)(1), when the felony was a conspiracy to violate civil rights, in violation of 18 U.S.C. 241.

**TABLE OF CONTENTS**



**TABLE OF AUTHORITIES**

Cases:

Constitution and statutes: Page

# In the Supreme Court of the United States

No. 05-787

MICHAEL BRAD MAGLEBY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 420 F.3d 1136. The opinion of the district court (Pet. App. 22a-41a) is unreported. The prior opinion of the court of appeals affirming petitioner's conviction on direct appeal (Pet. App. 42a-71a) is reported at 241 F.3d 1306.

## JURISDICTION

The judgment of the court of appeals was entered on August 19, 2005. A petition for rehearing was denied on September 20, 2005 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on December 19, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted of: (1) conspiracy to violate civil rights, in violation of 18 U.S.C. 241; (2) intimidation or interference with housing rights on the basis of race, in violation of 42 U.S.C. 3631(a); (3) use of fire to commit a felony, in violation of 18 U.S.C. 844(h)(1); and (4) tampering with a witness, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 46a. He was sentenced to 144 months of imprisonment. On direct appeal, the court of appeals affirmed. Pet. App. 42a-71a. Petitioner then filed a motion under 28 U.S.C. 2255 to set aside the conviction and vacate the sentence. The district court denied the motion. Pet. App. 22a-41a. The court of appeals again affirmed. Pet. App. 1a-19a.

1. On September 6, 1996, petitioner invited five friends to come to his house for a barbeque. The group discussed their dislike for people of other races, listened to racist music, and viewed racist web sites. Petitioner and a minor friend, L.M., built a cross that they intended to burn in front of the house of a group from the Kingdom of Tonga that had moved into the neighborhood, and they purchased gasoline to set the cross aflame. When they arrived at the house, however, there were several men outside the house, and they decided not to carry out their plan there. Pet. App. 2a.

There was evidence that L.M. then suggested that they burn the cross at the house of a black man instead; petitioner argued that L.M. had said "crackhead" instead of "black man." Petitioner and L.M. proceeded to burn the cross outside the home of Ron and Robyn

Henry and their eleven-year-old son. Ron is an African American and his wife Robyn is white. Pet. App. 45a.

2. The jury found petitioner guilty of conspiracy to violate civil rights, in violation of 18 U.S.C. 241, and intimidation or interference with housing rights on the basis of race, in violation of 42 U.S.C. 3631. The jury also found him guilty of using fire to commit a felony, in violation of 18 U.S.C. 844(h)(1); the predicate felony was the violation of 18 U.S.C. 241.[1] Under Section 844(h)(1), a defendant receives a prison sentence of ten years for a first conviction.[2] Petitioner was also found guilty of tampering with a witness, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 23a.

3. On appeal, petitioner argued that a jury instruction on the housing rights count was mistaken, because it permitted conviction if the defendant was motivated by race alone, rather than requiring proof that defendant was motivated both by race and by the fact that the victims were occupying a dwelling. Pet. App. 49a. Petitioner also challenged an instruction that the jury could consider "the reaction of the victims and other witnesses to the cross burning in determining the defendant's intent." *Id.* at 49a-50a. Petitioner further challenged the sufficiency of the evidence to support his civil rights, housing rights, and use of fire convictions.

---

[1] The jury also returned a verdict of guilty on an additional count under Section 844(h)(1) charging use of fire to commit the Section 3631 housing rights violation, but the trial court dismissed that count after trial. Pet. App. 23a.

[2] Petitioner quotes (Pet. 3) an earlier version of 18 U.S.C. 844(h)(1) (1994) that provided for a five-year sentence for a first offense. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, Tit. VII, § 708(a)(3), 110 Stat. 1296 (amending statute to increase punishment).

*Id.* at 51a-52a. Finally, petitioner challenged several evidentiary rulings of the district court. See *id.* at 59a-71a. The court of appeals rejected each of those challenges. *Id.* at 46a-71a.

3. Petitioner filed a motion under 28 U.S.C. 2255 in district court, seeking to have his conviction set aside and his sentence vacated. Pet. App. 22a. He argued that (1) his convictions under Sections 241 and 3631 "were based on * * * speech protected by the First Amendment;" (2) the "use of fire" violation under 18 U.S.C. 844(h)(1) "does not apply to all felonies;" (3) "the application of § 844(h)(1) to the act of cross-burning violates the First Amendment;" and (4) "18 U.S.C. 844(h)(1) was impermissibly applied to this case because the conspiracy entered into by the defendant was completed before he used fire in connection with any felony." Pet. App. 27a. Because those claims were not raised on direct appeal, they were subject to a procedural bar unless petitioner could show cause and prejudice. *Id.* at 26a. He sought to make that showing by advancing an additional claim that his counsel on direct appeal had provided ineffective assistance. *Id.* at 26a-27a.

The district court rejected petitioner's claim of ineffective assistance. The court examined each portion of the jury instructions that petitioner claimed permitted the jury to convict him for protected speech rather than a "true threat" of physical violence. Pet. App. 32a; see *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (defining "true threats" as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). The court concluded that "the jury instructions were adequate to en-

sure that [petitioner] was convicted only for * * * a threat of physical harm with the intent to advocate force; or at least that he intended to cause the [victims] to reasonably fear the use of imminent force." Pet. App. 37a.

With respect to Section 844(h)(1), the court rejected petitioner's argument that it applies only to arson, holding that the language of the statute is not so limited. Pet. App. 39a. The court also determined that Section 844(h)(1) is not a content-based restriction on speech when applied to cross-burning, because the sentence "for the use of fire is unrelated to the conduct's expressive content." *Id.* at 37a. Finally, the court held that the Section 844(h)(1) charge could be based on petitioner's conspiracy conviction, because the act of burning the cross was an overt act in petitioner's "ongoing [conspiracy] offense." *Id.* at 40a.

The district court concluded that "because the substantive merits of petitioner's claims have no merit, his appellate counsel was not constitutionally ineffective." Pet. App. 40a. See *ibid.* ("[Petitioner's] counsel's actions did not fall below an objective standard of reasonableness, and petitioner was not prejudiced by his counsel's failure to raise these issues on appeal.").

4. On appeal of the denial of his Section 2255 motion, petitioner renewed his argument that his counsel on direct appeal had provided ineffective assistance and that he was therefore excused from his procedural default. Adopting the standard in *Strickland* v. *Washington*, 466 U.S. 668, 687-688 (1984), the court held that petitioner had the burden of showing that "counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different." Pet. App. 5a (quoting *Strickland*, 466 U.S. at 687-688, 694). The court of appeals held that, based on "the state of the law at the time of [petitioner's] direct appeal," *id.* at 5a, petitioner's appellate counsel did not provide ineffective assistance, because counsel's omission of the claims now asserted by petitioner was not unreasonable under *Strickland*. *Id.* at 8a, 17a, 19a.

a. The court of appeals held that the failure of appellate counsel to challenge the Section 3631 instructions on First Amendment grounds was not unreasonable. Petitioner argued that those instructions permitted conviction for conduct that did not constitute a "true threat" of violence and therefore was protected by the First Amendment. The court noted that the primary instruction on Section 3631 stated that the government had to prove that "[t]he defendant used force or threat of force." Pet. App. 8a (emphasis omitted). A further instruction explained:

> [t]he term 'force' includes the exercise and application of physical power. In common usage force means power, violence, compulsion, or restraint exerted upon or against a person or thing.

*Id.* at 9a. Rejecting petitioner's argument that the instruction did not require the threat of physical violence or force, the court explained that "[t]he natural reading of the language in the instruction is that it is referring to physical force." *Id.* at 10a.

The court of appeals also rejected petitioner's claim that another portion of the same instruction, which stated that "to threaten or intimidate does not require the possibility of physical force or physical harm," Pet. App. 10a, permitted conviction without a threat of phys-

ical violence or force. The court held that "the quoted sentence can best be understood as explaining that the Government need not prove that the threat of force could or would actually be carried out." *Id.* at 11a (citing *Virginia* v. *Black*, 538 U.S. at 359-360).

b. The court also held that the failure of appellate counsel to challenge the Section 241 jury instructions on First Amendment grounds was not unreasonable. Pet. App. 11a-14a. The Section 241 instructions required the government to prove

> [t]hat the purpose of the conspiracy * * * was willfully to oppress, threaten or intimidate Ron Henry and Robyn Henry in the free exercise or enjoyment of the right to occupy their dwelling, or home, without intimidation or interference because of race.

*Id.* at 12a. The instructions added:

> The words 'oppress,' 'threaten,' or 'intimidate' are not used in any technical sense; they are to be understood in their ordinary meaning to cover a variety of conduct intended to threaten or frighten other persons or to prevent or punish the free action of other persons.

*Ibid.*

The court stated that the instructions were "flawed" because they "never define *threat* as requiring a threat of force" but instead "assert that *oppress, threaten, and intimidate* are used in their everyday sense." Pet. App. 13a. The court noted, however, that counsel may reasonably "forego a challenge to an improper instruction" if "the error is likely to be considered harmless." *Ibid.* The court found that "[t]hat likelihood is considerable here." *Ibid.* The court noted that "the jury's verdict on the § 3631 charge almost surely reflected a

finding that [petitioner's] cross burning constituted a willful threat of force" and that "the cross burning was the only object of the alleged § 241 conspiracy." *Id.* at 14a. In those circumstances, "it would be passing strange if the jury did not believe that [petitioner] and L.M. had conspired to threaten *force*." *Ibid.* The court added that, although petitioner's argument that the instruction was flawed relied on Eighth Circuit precedent in cross-burning cases, there was an "absence at the time of the appeal of any authority from the Supreme Court or this circuit adopting the law set forth in the Eighth Circuit cross-burning decisions." *Ibid.* The court concluded that, under all the circumstances, it "cannot say that it was objectively unreasonable for [petitioner's] appellate counsel not to raise the First Amendment challenges to his convictions under §§ 241 and 3631." *Ibid.*

c. The court also held that petitioner's appellate counsel had not been ineffective in failing to raise either of the Section 844(h)(1) claims petitioner advanced in his Section 2255 motion.[3] The court concluded that appellate counsel had not acted unreasonably in failing to claim that his Section 844(h)(1) conviction violated the First Amendment because it imposed special punishment on him because of the content of his speech. The court explained that increased punishment for "especially pernicious" threats, Pet. App. 16a, does not conflict with this Court's decision in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992), which prohibited basing punishment for even unprotected speech on the point of view being expressed. The court noted that threats

[3] On appeal, petitioner abandoned his claim that Section 844(h)(1) applies only to arson.

that make use of fire and are therefore subject to punishment under Section 844(h)(1) "exhibit to a higher degree than other felonious threats the characteristics that makes threats proscribable," because such threats have "the potential not only to frighten in a distinctly profound way but also * * * to cause the threatened harm to person or property." Pet. App. 16a. Accordingly, the court concluded that the merits of the claim that counsel failed to raise were "highly questionable." *Ibid.* See also *id.* at 17a ("doubtful").

The court also concluded that counsel had not acted unreasonably in failing to attack his Section 844(h)(1) conviction on the ground that that provision cannot be based on a Section 241 conspiracy. The court recognized that, in a decision that postdated petitioner's appeal by two years, the Seventh Circuit had agreed with petitioner's argument, reasoning that unless fire is used in the process of reaching agreement, a conspiracy that does not require proof of an overt act cannot be the predicate felony under Section 844(h)(1). Pet. App. 17a (citing *United States* v. *Colvin*, 353 F.3d 569 (7th Cir. 2003) (en banc), cert. denied, 543 U.S. 925 (2004)). The court stated however, it was "not sure" it "would embrace *Colvin*." *Ibid.* The court discussed a number of ways in which conspiracy is a "*continuing* offense, encompassing the acts performed in furtherance of the agreement."[4] The court determined that an ultimate

[4] See Pet. App. 17a ("venue is proper wherever acts in furtherance of the conspiracy occur"); *id.* at 17a-18a (noting that for the exception to hearsay for statements of a co-conspirator "the statement need not further the *attainment* of an agreement; it is enough that it further an *object* of the agreement"); *id.* at 18a ("for statute-of-limitations purposes, a non-overt-act conspiracy is not committed simply on the date the agreement is made but 'is deemed to continue as long as its

decision on the merits of the question whether Section 844(h)(1) applies to a conspiracy under Section 241 was unnecessary, however, because at the time of direct appeal "[n]o decisions had yet adopted [petitioner's] view," and therefore his counsel's failure to raise the issue was not unreasonable under *Strickland*. *Id.* at 18a.

**ARGUMENT**

Petitioner argues that further review is warranted to address the court of appeals' application of the *Strickland* standard to his claim of ineffective assistance of appellate counsel and to address his substantive claims that the jury instructions in this case did not adequately protect his First Amendment rights and that a Section 844(h)(1) conviction cannot be based on a Section 241 conspiracy. The court of appeals' application of the *Strickland* standard to the particular facts of this case does not conflict with any decision of any other circuit and does not warrant further review. The merits of the substantive issues petitioner discusses are not squarely before the Court in this case, which arises on collateral review and presents only the question whether petitioner's appellate counsel acted unreasonably. Those substantive issues would not in any event warrant further review.

1. Petitioner urges the Court to grant certiorari in order to resolve the "open * * * question of what standards to apply to ineffective assistance of appellate counsel" claims. Pet. 14 (quoting *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985) ("We therefore need not decide the

---

purposes have neither been abandoned nor accomplished, and no affirmative showing has been made that it has terminated'") (quoting *United States* v. *Arnold*, 117 F.3d 1308, 1313 (11th Cir. 1997)).

content of the appropriate standards for judging claims of ineffective assistance of appellate counsel.")). Petitioner admits (*ibid.*) that all of the courts of appeals have applied the *Strickland* standard to such claims, as did the court of appeals in this case. See Pet. App. 5a. Indeed, this Court's own decisions have applied the *Strickland* standard to claims of ineffective assistance of appellate counsel.

a. In *Smith* v. *Murray*, 477 U.S. 527 (1986), this Court applied the *Strickland* standard to a claim of ineffective assistance of appellate counsel. See *id.* at 535 ("Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington*").[5] In *Murray*, the prisoner claimed that counsel rendered ineffective assistance by failing to raise on appeal the issue of admissibility of testimony of a court-appointed psychiatrist who testified at the sentencing phase about a past sexual offense of a defendant convicted of rape and murder. *Id.* at 529-530. Counsel had objected to the admission of the testimony at trial, but did not raise the issue on direct appeal. *Id.* at 531. This Court noted that "various forms of the claim [that the prisoner's counsel omitted on direct ap-

---

[5] See *Smith* v. *Robbins*, 528 U.S. 259, 285 (2000) (citing *Smith* v. *Murray*, 477 U.S. 527 (1986), and characterizing it as "applying *Strickland* to claim of attorney error on appeal"); *id.* at 287-288 (determining that the *Strickland* standard applies where appellate counsel has complied with applicable state procedure and found a criminal defendant's appeal to be frivolous and stating "[i]t is no harder for a court to apply *Strickland* in this area than it is when a defendant claims that he received ineffective assistance of appellate counsel because his counsel, although filing a merits brief, failed to raise a particular claim").

peal] had been percolating in the lower courts for years at the time of his original appeal." *Id.* at 537. But the Court determined nonetheless that counsel's failure to raise the claim on direct appeal had not been unreasonable under *Strickland*. The Court explained that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Id.* at 536 (quoting *Jones* v. *Barnes*, 463 U.S. 745, 751-752 (1983)). The Court expressly reaffirmed the principle that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and "to evaluate the [attorney's] conduct from counsel's perspective at the time." *Ibid.* (quoting *Strickland*, 466 U.S. at 689) (brackets in original). See *id.* at 534 (characterizing as "irrelevant" a decision by the appellate court that heard petitioner's appeal that was reached after that appeal).

The court of appeals in this case followed the reasoning of *Murray*. As in *Murray*, petitioner's appellate counsel omitted issues on appeal that had been preserved at trial, and petitioner argues that he gained no "tactical advantage" in doing so. Pet. 16. Like this Court in *Murray*, the court of appeals concluded that counsel's performance on appeal had to be judged in light of "the state of the law at the time of" counsel's action—*i.e.*, at the time of petitioner's direct appeal. Pet. App. 5a. And like this Court in *Murray*, the court of appeals concluded that counsel's decision not to pursue the omitted claims was not deficient performance under *Strickland*, because appellate counsel had engaged in a process of "winnowing out" the arguments to be presented on appeal that was not unreasonable when

viewed from that *ex ante* perspective. See, *e.g.*, *ibid.* Indeed, the court not only examined each of the omitted claims from that perspective and found them wanting, but it also noted that, even if an appeal on one or the other ground would have had some chance of success, "counsel could also reasonably fear that the issue was more likely to distract the appellate court's attention from issues with a greater likelihood of success." *Id.* at 11a. As the court explained, "[a]lthough we now know that this court rejected all the issues raised on direct appeal, those issues were not frivolous" and their analysis "took a published opinion occupying 12 pages of text in the reporter to dispose of them." *Ibid.*

b. Petitioner asserts (Pet. 14-15) that there is a conflict in the circuits on the proper application of *Strickland* to an ineffective assistance of appellate counsel claim. Petitioner bases his argument on a purported difference between the Second and Seventh Circuits, which require a "comparison between merits of raised and unraised claims," Pet. 15 (citing *Gray* v. *Greer*, 800 F.2d 644 (7th Cir. 1986), and *Mayo* v. *Henderson*, 13 F.3d 528 (2d Cir. 1994), cert. denied, 513 U.S. 820 (1994)), and the Tenth Circuit, which requires an examination of "the merits of the omitted issue," Pet. 15 (citing *Banks* v. *Reynolds*, 54 F.3d 1508 (1995)).

Closer examination reveals that those cases do not state different legal standards, but simply deal with different factual contexts. In *Banks*, the court concluded that the omitted arguments were "clearly meritorious." 54 F.3d at 1515. There was, therefore, no need to examine the arguments made on direct appeal, because omitting a clearly meritorious claim was enough in the circumstances of that case to constitute

objectively deficient performance.[6] In contrast, the court in *Mayo* concluded that the omitted claim was "particularly strong." 13 F.3d at 534. But the court in *Mayo* then went on to compare the particularly strong claim that was omitted with the "extremely weak" claims presented on direct appeal, and found, based on that comparison, that the appellate attorney's performance was objectively deficient. *Ibid.* That no circuit split exists is well illustrated by *Cargle* v. *Mullin*, 317 F.3d 1196 (10th Cir. 2003), which harmonizes the holdings of *Banks* and *Mayo*. *Cargle*, 317 F.3d at 1202-1203 ("If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted

---

[6] Petitioner's contention (Pet. 17-18) that the court of appeals departed from its own "dead bang winner" standard in this case is mistaken. The Tenth Circuit has used the term "dead-bang winner" to refer to an omitted claim that is clearly meritorious, see *e.g.*, *United States* v. *Cook*, 45 F.3d 388, 395 (10th Cir. 1995), and the omission of such a claim may form a basis for a claim of ineffective assistance of appellate counsel. See *Cargle* v. *Mullin*, 317 F.3d 1196, 1202 n.4 (10th Cir. 2003) ("omission of a clearly meritorious issue can be a sufficient basis for such a claim"). That does not mean, however, that a decision on the merits is necessary to the determination of ineffective assistance claims. See *ibid.* ("This court recently rejected the idea that omission of a 'dead bang winner' issue is a necessary condition for prevailing on an appellate ineffectiveness claim. ") (citing *Neill* v. *Gibson*, 278 F.3d 1044, 1057 n. 5 (10th Cir. 2001), cert. denied, 537 U.S. 835 (2002)). In this case, because the court determined that there was no clearly meritorious issue that appellate counsel had omitted, the court had no occasion to use the "dead-bang winner" formulation. In any event, a claim that the court of appeals failed to follow its own precedent would not warrant further review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.") (citing *Smith*, 528 U.S. at 288, *Banks*, 54 F.3d at 1515-1516, and *Mayo*, 13 F.3d at 533).

2. Petitioner argues that the jury instructions on the Section 241 and Section 3631 counts permitted the jury to convict him for conduct that was protected by the First Amendment, see Pet. 19-27, and that a Section 844(h)(1) conviction may not be based on a Section 241 conspiracy, see Pet. 27-33. Those claims are not squarely before this Court in this case.

This case arises from petitioner's motion under Section 2255, in which he attempted to present claims that were defaulted on direct appeal. The court of appeals held—and petitioner does not dispute—that those claims were thus procedurally barred unless petitioner could show cause and prejudice to excuse his default. Pet. App. 4a. The court of appeals decided this case on the ground that petitioner was unable to make a showing of cause for the default, because he was unable to show that he received ineffective assistance of counsel.

In that posture, the only issue presented to the court of appeals was the case-specific one of whether petitioner received ineffective assistance of counsel on direct appeal. To resolve that question, the court of appeals did have to consider the merits of the claims that petitioner sought to raise, in order to determine whether counsel rendered ineffective assistance in fail-

ing to raise them. But the court did not ultimately have to resolve those claims.

For example, the court of appeals did not decide whether the Section 3631 jury instructions in this case were inadequate. Instead, the court concluded only that "[i]f there is a flaw [in the Section 3631 jury instructions], it is a subtle one," and that, although "[p]erhaps an appeal on this ground would have succeeded," counsel could also reasonably have concluded that other issues were more promising. Pet. App. 10a-11a. On the Section 241 count, the court did state that the instructions were "flawed," but it did not definitively resolve whether any error would have entitled petitioner to relief. Instead, it concluded only that counsel could have reasonably omitted the claim of instructional error on appeal, because the likelihood that the error would be considered harmless was "considerable." *Id.* at 13a. On the permissibility of applying Section 844(h)(1) based on the Section 241 conspiracy, the court concluded only that it was "not sure" that it would adopt petitioner's position in light of considerable arguments opposing it, *id.* at 17a, and that it "need not resolve" the issue definitively because "it was not so obvious at the time of [petitioner's] direct appeal that counsel's failure to raise [the issue] was unreasonable," *id.* at 18a.

In its present posture, this case therefore presents only the question whether the court of appeals erred in concluding that petitioner's appellate counsel was not ineffective. It does not present an appropriate opportunity for this Court to address the merits of the various substantive issues that petitioner seeks to present. Thus, even if resolution of the substantive issues identified by petitioner otherwise warranted this Court's re-

view, such review would better await a case in which the merits of those issues would be squarely presented and could be finally settled.

3. In any event, the substantive issues identified by petitioner would not warrant further review.

a. Contrary to petitioner's contention (Pet. 25-26), the Section 3631 jury instructions adequately ensured that petitioner could not be convicted for engaging in conduct protected by the First Amendment. In *Virginia* v. *Black*, this Court determined that "[i]ntimidation," which "is a type of true threat," is "constitutionally proscribable" when done "with the intent of placing the victim in fear of bodily harm." 538 U.S. at 360. The Section 3631 jury instructions in this case adequately conveyed to the jury that only conduct threatening use of physical force is proscribed. The jury was instructed that, to convict petitioner, it had to find that petitioner "*used force or threat of force*," and that "[t]he term 'force' includes the exercise and application of physical power" and "means power, violence, compulsion, or restraint exerted upon or against a person or thing." Pet. App. 8a, 9a. That is sufficient to ensure that the jury convicted petitioner only upon finding that he had used a "threat of force" as that term was understood in *Black*—*i.e.*, a threat that was intended to "plac[e] the victim in fear of bodily harm."

Petitioner also objects to the statement in the instructions that "to threaten or intimidate does not require the possibility of physical force or physical harm." Pet. 26 (emphasis omitted); see Pet. 24. As the court of appeals held, see Pet. App. 11a, that statement correctly informed the jury that it could convict if petitioner's cross burning amounted to a threat of physical force, even if petitioner did not actually intend to carry

out the threat. See *Black*, 538 U.S. at 360 (determining that a cross burner "need not actually intend to carry out the threat" in order for his conduct to be proscribable).

b. With respect to the Section 241 conviction, even if the instructions permitted conviction without requiring a threat of force and, as the court of appeals stated, were "flawed" for that reason, see Pet. App. 12a, the error was harmless. Petitioner was charged pursuant to Section 241 with conspiracy to "oppress, threaten, or intimidate" the Henrys "in the free exercise or enjoyment of" their housing rights. It is undisputed that the charged Section 241 conspiracy was a conspiracy to engage in the cross burning, which was itself the basis of the Section 3631 charge. As explained above, the instructions on petitioner's Section 3631 charge did require the jury to find use or threat of force as an element of the crime and explained that the force must be physical force. The jury's finding of guilt on that charge therefore shows that the jury determined that petitioner's cross burning exhibited physical force or the threat of physical force. Accordingly, the jury's finding on the Section 3631 count established that, even if the instructions on the Section 241 count failed to require proof that petitioner had conspired to use physical force against the victims and was flawed, the jury would have found that the object of the conspiracy was a "true threat"—*i.e.*, a threat of physical force against the victims. Contrary to petitioner's argument (Pet. 27), there is no danger that petitioner was convicted under Section 241 for conspiring to engage in conduct protected by the First Amendment. Further review of petitioner's First Amendment claims would therefore be unwarranted.

c. Nor would further review be warranted to determine whether a Section 241 conspiracy may be a predicate offense on which a Section 844(h)(1) conviction can be based. See Pet. 27-33. In *United States* v. *Colvin*, 353 F.3d 569, 576 (2003) (en banc), cert. denied, 543 U.S. 925 (2004), the Seventh Circuit held that Section 844(h)(1) could not be based on a Section 241 conspiracy. No other court of appeals, however, has ruled on that issue. The court of appeals in this case did not reach a final conclusion on that issue, although it did observe that there are substantial reasons not to "embrace *Colvin*." Pet. App. 17a. There is accordingly no conflict in the circuits on the question whether Section 241 may be a predicate for a Section 844(h)(1) conviction, and petitioner has made no showing that that question is of such exceptional importance that further review would be warranted even in the absence of a conflict.[7]

[7] Quoting the trial transcript, petitioner notes (Pet. 29) that, in response to argument, the trial court expressed doubt about whether Section 844(h)(1) could be based on a Section 241 predicate felony. Ultimately, however, the trial court determined that petitioner's argument was mistaken, and it declined to dismiss the Section 844(h)(1) count. The same district court again concluded in analyzing petitioner's Section 2255 motion that "petitioner's act of burning a cross was part of his conspiracy to burn a cross" because it was an overt act of the conspiracy. Pet. App. 40a.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*

WAN J. KIM
*Assistant Attorney General*

JESSICA DUNSAY SILVER
NATHANIEL S. POLLOCK
*Attorneys*

MARCH 2006